Office-Supreme Court, U.S.
FILED
JUN 23 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 150

THE GEMEX CORPORATION, a New Jersey corporation,

Petitioner,

vs.

A. C. BECKEN CO., an Illinois corporation,

Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LORENZ B. KNOUFF,
MARSHALL PATNER,
Attorneys for Respondent.

DIXON, MORSE, KNOUFF & HOLMES,
38 South Dearborn Street,
Chicago 3, Illinois,
RA 6-1660

THE ANTHONY-MARRIN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 1122.

THE GEMEX CORPORATION, a New Jersey corporation,

Petitioner,

vs.

A. C. BECKEN CO., an Illinois corporation,

Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, defendant below, asks this Court to review damages awarded pursuant to 15 U. S. C. A. Section 15, after petitioner's liability was established for violation of Section 1 of the Sherman Act, 15 U. S. C. A. Section 1. The damages are respondent's anticipated lost profits caused by petitioner's violation of the anti-trust laws. The violation was petitioner's refusal to continue to sell watchbands to respondent, a jewelry wholesaler, when respondent refused to enter into an illegal price fixing agreement. Liability was established after appeal, 272 F. 2d 1 (Appendix B to Petition, pp. 2a-9a) and this Court denied certi-

orari, 362 U. S. 962. The record at that point contained respondent's proof of damage for the full period of harm. Petitioner omits the fact that certiorari was previously denied in this case.

Petitioner's request in the present petition for review of the judgment for damages is based on these arguments: Petitioner contends that damages were not proved to be the result of the anti-trust violation (Petition, pp. 7-8). In the alternative, petitioner argues that if it did cause respondent damage, recovery is limited to the period from the date the violation occurred to the date the complaint was filed (Petition, p. 7); or that damages in this case were mitigated by a valid reoffer to sell (Petition, pp. 9-10).

Petitioner's first argument fails because the fact of damage was established in the first appeal, 272 F. 2d 1, at pp. 4-5 (Appendix B to Petition, pp. 6a-8a), and certiorari was denied, 362 U. S. 962. Petitioner's second argument is that recovery should be limited to the period from the violation, August 2, 1956, (App. p. 3) to the filing of the complaint, November 23, 1956 (App. p. 2). This argument was also rejected by the Court of Appeals in the first appeal when the Court approved respondent's method of proof for the full period of harm, 272 F. 2d 1, at pp. 4-5 (Appendix B to Petition, pp. 6a-8a). Petitioner now argues, however, that the courts below erred in allowing damages for anticipated losses beyond that period, and contends that in order to recover lost profits, respondent should have been required to file a supplemental complaint after the losses were actually sustained. To support this argument, petitioner contends that the opinion below conflicts with a prior opinion of this Court and with opinions of other circuits as to the period of recovery.

Petitioner states that there is a conflict between the opinion below and *Lawlor* v. *Loewe*, 1915, 235 U. S. 532, at

537. However, it is clear from the language petitioner quotes (Petition, p. 8) that future damage caused by violation of the anti-trust laws may be recovered if proved. The *Lawlor* case affirmed the Court of Appeals where the question had been squarely decided, *Lawlor* v. *Loewe*, 2 Cir., 1913, 209 Fed. 721. There, at 728-729, the Court held that such damages could be recovered without supplemental pleadings or proofs. In the opinion below in the present case the Court cited that opinion and quoted the language that is directly relevant here, 314 F. 2d. 839, 842-843 (Appendix D to Petition, pp. 31a-32a).

The various circuits that have dealt with this question all follow the *Lawlor* case. *Connecticut Importing Co.* v. *Frankfort Distilleries*, 2 Cir., 1939, 101 F. 2d 79, at 81, cited by petitioner, and *Frey & Son* v. *Welch Grape Juice Co.*, 1915, 240 Fed. 114, at 117, cert. den. 251 U. S. 551 (rev'd other grds., 261 Fed. 68), each hold future damages recoverable if proved as a result of the violation. *Frey & Son* v. *Cudahy*, D. C. Md., 1917, 243 Fed. 205, cited by petitioner was reversed in 261 Fed. 65, at 67.

In the principal case relied on by the Court of Appeals on liability in the first appeal of this case, *Wm. Rankin Co.* v. *Associated Bill Posters*, 2 Cir., 1930, 42 F. 2d 152, cert. den. 282 U. S. 862, at p. 155, a damage award for five years of anticipated losses was approved without supplemental proceedings, after proof of illegal exclusion from the market. Petitioner cites *Flintkote* v. *Lysfjord*, 9 Cir., 1957, 246 F. 2d 368, to overcome this result. However, the *Flintkote* case does not apply because the plaintiff there did not ask for recovery for continuing damage, but only for those sustained (p. 372) "* * * up to the date of the filing of the complaint," and the question raised here was not before the Court.

It is clear that there is no conflict between the opinion of the Court below and any of the cases cited by petitioner.

Petitioner's final argument is that damages were mitigated by a reoffer to sell. This is merely a question of evidence and turns on the facts in the record. The argument fails because there is no evidence of a valid reoffer to sell to respondent, and the mitigation rule does not apply to the facts in this case.

Respondent respectfully urges this Court to deny review of the points raised in this petition.

LORENTZ B. KNOUFF,
MARSHALL PATNER,
Attorneys for Respondent.

DIXON, MORSE, KNOUFF & HOLMES,
38 South Dearborn Street,
Chicago 3, Illinois,
RA 6-1660.